

Bills Committee on Contracts (Rights of Third Parties) Bill

Administration's Responses to Views and Comments of Deputations and Written Submissions made to the Bills Committee

<p><u>Summary of Views and Comments of Deputations and Written Submissions made to the Bills Committee</u></p>	<p><u>Administration's Responses</u></p>
<p>1. <u>Construction Industry Council ("CIC")</u></p>	
<p>(a) The CIC expressed in-principle support for the Bill.</p> <p>(b) The CIC considered that the construction industry would benefit from the rights conferred on third parties by the Bill which would:</p> <ul style="list-style-type: none"> • provide a more straightforward route to allow third parties to enforce their rights; • ensure that classes of third parties are protected even if the particular users or beneficiaries of construction works cannot be identified; and • help avoid the formalities of execution of warranties and assignments involving multiple parties which would otherwise be necessary. <p>(c) In respect of the comments of some stakeholders of the construction industry that the Bill might create additional</p>	<p>The Administration welcomes the CIC's support for the Bill. As rightly pointed out by the CIC, the Bill would allow the contracting parties the freedom to confer an enforceable right on a third party if they so wish. If it is the contracting parties' intention to permit a third party to enforce the contract, the Bill would provide the third party with an additional channel, which would be more straight-forward and convenient, to enforce the contract.</p>

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<p>liabilities to contracting parties, the CIC noted that the applicability of the Bill would be very much subject to express provisions in the contract. The Bill would not in itself increase liabilities as such but would provide an efficient means to address third parties rights in the construction industry.</p>	
2. <u>The Hong Kong Confederation of Insurance Brokers ("HKCIB")</u>	
<p>(a) HKCIB shared the comments raised by the Hong Kong Federation of Insurers.</p> <p>(b) HKCIB took the view that if an insurance contract would specify the applicability of the Bill, it would make the position clearer.</p>	<p>The Bill would allow the contracting parties the freedom to confer an enforceable right on a third party if they so wish. If it is the contracting parties' intention to permit a third party to enforce the contract, the Bill would provide the third party with an additional channel, which would be more straight-forward and convenient, to enforce the contract. If it is the contracting parties' intention to exclude the contract from the application of the Bill, they would be free to so provide in the contract.</p>
3. <u>The Chartered Institute of Arbitrators (East Asia Branch) ("CI Arb EAB")</u>	

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<p>(a) CI Arb EAB generally supported the Bill and welcomed Clause 12 which clarified the third parties' rights in arbitration agreements.</p> <p>(b) CI Arb EAB suggested to limit the scope of Clause 4(4) by adding the following wording at the end of that clause: "unless those terms are grossly unfair or unconscionable".</p> <p>(c) CI Arb EAB suggested that Clause 4(1)(b) may benefit from the English case <i>Dolphin Maritime & Aviation Services Ltd. v Sveriges Angfartygs Assurans Forening</i> [2009] EWHC 716 (Comm); [2010] 1 All ER (Comm) 473; [2009] 2 Lloyd's Rep 123; (2009) 1 CLC 460 by explicitly clarifying that "benefit" referred to a direct benefit to be received by the third party from the promisor and must not be just a consequential or incidental benefit stemming from the promisor's performance.</p>	<p>(a) The Administration welcomes the CI Arb EAB's support for the Bill, in particular with respect to Clause 12.</p> <p>(b) We consider that limiting the scope of Clause 4(4) would not be consistent with the underlying policy of the Bill that the contracting parties' intention should be respected and given effect to.</p> <p>(c) We take note of the English decision in <i>Dolphin Maritime & Aviation Services Ltd.</i> Instead of incorporating the principle of a particular case in the Bill, we consider that it would be more appropriate for the court to decide what would amount to a "benefit" for the purpose of Clause 4(1)(b) in the relevant circumstances, with reference to all relevant case law developed at the material time, as appropriate.</p>

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4. <u>The Life Underwriters Association of Hong Kong Limited ("LUA")</u>	
<p>The LUA commented that Clause 6(4) may not be practical. Under Clause 6(4), the third party should be aware of any express term on variation or rescission of the contract without the consent of the third party or that reasonable steps should be taken to bring that term to the notice of the third party. The operation of Clause 6(4) would cause difficulties in circumstances where the third party is an infant or where the promisee may not want the insurer to contact the third party.</p>	<p>Under Clause 6(3), contracting parties are free to provide express terms for rescission or variation of the contract without the consent of the third party or provide that the third party's consent is required only in circumstances specified by the parties themselves. Therefore, contracting parties would have autonomy to ensure the practicability of the relevant terms, including how clause 6(4) may be met in the case of a third party being an infant. Further, as suggested by the LRC in para. 4.85 of the Report, the insurer can stipulate in the contract that the insured should bear the responsibility of informing the third parties of the term.</p>
5. <u>The Chartered Institute of Building (Hong Kong) ("CIB")</u>	
<p>(a) The CIB commented that contractors in the construction industry would take a passive role in the drafting of the main contract which would generally reflect the requests of the Government or the main contractors as the case may be.</p>	<p>(a) The Administration takes note of CIB's comments.</p>

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<p>(b) The CIB would welcome clear guidelines on how third parties' rights would be protected under the Bill and suggested that certain promotion should be undertaken to ensure the contractors and members of the public would understand the effect of the Bill.</p>	<p>(b) Since the needs and circumstances of each contracting party vary, the Administration considers that the contracting parties themselves should be in the best position to know what they want to achieve in their contract and to customize the terms of their contract in order to fully reflect their intention, taking into account all relevant considerations and seeking legal advice where necessary. We note the concern raised by various stakeholders on the provision for adequate time to enable different players in the industries to make due preparation for the operation of the Bill when enacted. In this regard, we plan to bring the Bill into force six months after the Bill has been passed by the Council, subject to further views of the stakeholders and the Bills Committee. We would also consider taking appropriate steps to promote the general awareness of the Bill, when enacted.</p>

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6. <u>The Hong Kong Construction Association ("Construction Association")</u>	
<p>(a) The Construction Association considered that introduction of the proposed legislation was not right or necessary for the construction industry which should be excluded from the legislation. The application of the proposed legislation to the construction industry would cause confusion, uncertainty and potentially chaos and would not benefit the end users and procurers of construction projects and buildings.</p> <p>(b) The industry already has tried and tested methods for benefiting third parties and providing them with enforceable rights by the use of collateral warranties and transferrable guarantees. The proposed legislation would unlikely provide additional rights to those which would have been provided by collateral warranties.</p>	<p>(a) The comments of the Construction Association have been carefully considered and addressed to in detail by the LRC (paras. 4.180 - 4.182 of the Report). The Administration has duly considered the views of the Construction Association and agree with the observation of the LRC that there exists no strong justification for excluding construction contracts from the application of the Bill.</p> <p>(b) As pointed out by CIC (see item 1 of this table), we consider that the Bill would provide a third party with a more straight forward and convenient channel to enforce his rights under a contract when compared with collateral warranties. It is because the Bill would allow contracting parties to incorporate terms in collateral warranties into their contract without the inconvenience of entering into separate contracts and classes of third parties could be protected without the need of assignment of collateral warranties to them.</p>

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<p>(c) The contractual network for any construction project is complex and involves many stakeholders like subcontractors, suppliers and consultants. If the proposed legislation is to apply to the construction industry, it would be a lengthy and burdensome process for industry participants to consider all their contracts, identify where rights are to be provided to or not and then amend their contracts accordingly.</p>	<p>(c) We consider that the Bill would help removing the anomalies of the common law doctrine of privity of contract which are apparent in the construction industry and in addition, the industry would benefit under the present reform which would, for example:</p> <ul style="list-style-type: none">• allow a main contractor to include in the contract with the employer exclusion clauses limiting liability for his own benefit and that of sub-contractors; and• enable a sub-contractor to sue the employer direct for payment if the relevant contract so provides. <p>(d) The Bill would allow the contracting parties the freedom to confer an enforceable right on a third party if they so wish. It would be up to the parties to formulate terms of their contracts which fit their needs, including the specific needs of a particular industry or type of contract.</p>

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7. <u>Consumer Council</u>	
<p>(a) In the absence of any specific legislation on consumer protection which would enable consumers to turn to for direct and convenient remedy for damage, injury or loss suffered due to a breach of a contract to which he is not a party, the Consumer Council considered that the proposed two-limb test of enforceability under Clause 4 should be relaxed specifically for consumers.</p> <p>(b) The Consumer Council suggested that a specific enforceability test along the line of Option 8 or Option 9 as set out in para. 4.31 of the LRC's Report should be adopted, i.e.:</p> <ul style="list-style-type: none">• "a third party may enforce a contract on which he justifiably and reasonably relies, regardless of the intention of the parties"; or• "a third party may enforce a contract which actually confers a benefit on him, regardless of the purpose of the contract or the intention of the parties".	<p>The LRC has considered the suggestions proposed by the Consumer Council in detail and considered it not appropriate to adopt the proposals (see paras. 4.38 - 4.45 of the Report). The Administration shares the views of the LRC. In particular, the underlying principle of the Bill is to respect the contracting parties' freedom of contract and to give effect to parties' intention to confer legally enforceable rights on a third party. A more relaxed or lenient test of enforceability for consumers may enable a consumer to enforce a right even when it is inconsistent with the parties' intention and this would contradict the principle of freedom of contract.</p>

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8. <u>The Hong Kong Federation of Insurers ("HKFI")</u>	
<p>(a) The HKFI observed that notwithstanding that insurance contracts have not been excluded from the UK Act, it would be perfectly possible for parties to an insurance contract to exclude the operation of the Act through the proper construction of policy wording. The HKFI requested the Administration to confirm that under the Bill, insurers would be allowed to exclude the operation of the Bill in an insurance contract.</p> <p>(b) The HKFI observed that their previous concern about Clause 6 of the Bill regarding the need for the third party's consent to rescission or variation of the contract could be addressed through careful construction of policy wording. Likewise,</p>	<p>(a) The underlying principle of the Bill is to respect the contracting parties' freedom of contract and to give effect to parties' intention to confer legally enforceable rights on a third party. The Bill would enable the contracting parties to confer an enforceable right on a third party if they so wish. If the contracting parties would otherwise like to exclude the enforcement of rights under the contract by a third party, they are free to expressly state so in their contract. However, the Administration would encourage the contracting parties to carefully consider the purpose of the proposed statutory scheme and customize the terms of their contract, in order to fully reflect their intention, taking into account all relevant considerations and seeking legal advice where necessary.</p> <p>(b) The Administration agrees with the HFI's observations regarding both Clause 6 and cut-through clauses in the context of reinsurance contracts. In particular, contracting parties are free to provide in express terms for rescission or variation</p>

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<p>the HKFI considered that their concern about the enforceability of a cut-through clause in a reinsurance agreement could also be addressed by suitable policy wording.</p>	<p>of the contract under Clause 6(3) without the consent of the third party or to provide that the third party's consent is required only in circumstances specified by the parties themselves. Contracting parties would accordingly have autonomy to ensure the practicability of the relevant terms.</p>

Department of Justice
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